Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

No. 92-1149

In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., ET AL.,

Petitioners,

v.

UTE DISTRIBUTION CORPORATION; a Utah Corporation; BRUCE E. BABBITT, Secretary of the United States Department of the Interior,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR UTE DISTRIBUTION CORPORATION IN OPPOSITION

MAX D. WHEELER
CAMILLE NEDDO JOHNSON
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145
(801)521-9000

Attorneys for Respondent Ute Distribution Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the decision of this Court in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), that respondent Ute Distribution Corporation ("UDC"), and not petitioner Affiliated Ute Citizens ("AUC"), is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the Ute Tribal Business Committee, all indivisible assets of the Ute Indian Tribe, collaterally estops the claims of AUC (and claims of the individual petitioners), that AUC, and not UDC is the authorized representative of the mixed-bloods.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 10

ARGUMENT 10

A. The Issue Decided in *Affiliated Ute* Is Identical With The Issue Presented by Petitioners In The Present Action 12

B. The Authorized Representative Issue Presented In *Affiliated Ute*, Was Finally Adjudicated On The Merits 12

C. Petitioners Were Parties, Or In Privity With Parties To *Affiliated Ute* 16

D. AUC Had A Full And Fair Opportunity To Litigate The Authorized Representative Issue 17

CONCLUSION 18

TABLE OF CONTENTS – Continued

Page

APPENDIX

Appendix A: Excerpts from Constitution of the Affiliated Ute Citizens of the State of Utah.....App. 1

Appendix B: Excerpts from Articles of Incorporation of Ute Distribution Corporation.... App. 7

Appendix C: Resolution of the Board of Directors of the Affiliated Ute Citizens of Utah 59-8.....App. 12

Appendix D: Excerpts from Brief for Petitioners, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (No. 1331)...App. 14

TABLE OF AUTHORITIES

Page

CASES

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972) ..... *passim*

Affiliated Ute Citizens v. United States, 431 F.2d 1349 (1970) 8

Affiliated Ute Citizens v. Ute Indian Tribe, No. 85-C-0569J (D. Utah February 3, 1987) 9

Allen v. McCurry, 449 U.S. 90 (1980) 11

Hackford v. First Security Bank, 521 F.Supp. 541 (D. Utah 1981) 9

Maldonado v. Hodel, 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g*, 683 F.Supp. 1322 (D. Utah 1988) 9

Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation, 975 F.2d 683 (10th Cir. 1992) 1

Reyos v. United States, 432 F.2d 1337 (10th Cir. 1970) ..... *passim*

United States v. Crawley, 837 F.2d 291 (7th Cir. 1988) (quoting *Stover v. Stover*, 483 A.2d 783 (Md. App. 1984)) 12, 13

Ute Distribution Corp. v. United States, 721 F.Supp. 1202, n. 6 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Ute Partition Act of August 27, 1954, ch. 1009, 68 Stat. 868, codified and amended at 25 U.S.C. §§ 677-677aa. 2

25 U.S.C. § 677e 3

25 U.S.C. § 677i 2, 3

28 U.S.C. § 1254(1) 2

MISCELLANEOUS

Sup. Ct. R. 10.1(a) 18

No. 92-1149

In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., ET AL.,

Petitioners,

v.

UTE DISTRIBUTION CORPORATION; a Utah Corporation; BRUCE E. BABBITT, Secretary of the United States Department of the Interior,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR UTE DISTRIBUTION CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Murdock v. Ute Indian Tribe of Uintah & Ouray Reservation*, 975 F.2d 683 (10th Cir. 1992), and is reproduced at Petitioners' Appendix A. The unreported Order of the United States District Court for the District of Utah is reproduced at Petitioners' Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on September 9, 1992. On November 30, 1992, Justice Byron R. White entered an Order extending the time for the filing of Petitioners' Petition for a Writ of Certiorari until January 7, 1993. The Petition was timely filed. On February 1, 1993, this Court extended the time for filing the UDC's Brief in Opposition to Petition for a Writ of Certiorari, to and including March 10, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ute Partition Act of August 27, 1954, ch. 1009, 68 Stat. 868, codified and amended at 25 U.S.C. §§ 677-677aa. The relevant portions of the Ute Partition Act are reproduced at Petitioners' Appendix D.

STATEMENT OF THE CASE

Petitioners AUC, Glen Mac Murdock, Jr. (a member of AUC who is enrolled as a mixed-blood Ute Indian), and his son, Mac Eugene Murdock filed the instant action seeking declaratory relief, including a declaratory judgment that AUC rather than UDC is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the Ute Indian Tribal Business Committee, all indivisible assets of the Ute Indian Tribe, pursuant to Section 677i of the Ute Partition Act.

The Ute Partition Act was enacted by Congress in 1954 and divided the Ute Indian Tribe into two groups, mixed-blood members and full-blood members, for purposes of partitioning and distributing tribal assets and terminating federal supervision over the property of the mixed-blood members.

Section 10 of the Ute Partition Act, 25 U.S.C. § 677i, states that when the final membership rolls of the mixed-blood and full-blood groups had been published, the Tribal Business Committee, representing the full-bloods, and the authorized representatives of the mixed-bloods were to commence division of the assets of the tribe that were then susceptible to equitable and practicable distribution. (Petitioners' Appendix D "Pet. App." at 24-26).

The Ute Partition Act also provides that:

> All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law. . . .

25 U.S.C. § 677i. (Pet. App. D at 25).

The Ute Partition Act authorized the mixed-blood members of the tribe to organize in order to adopt bylaws and a constitution, and to provide by that constitution for "[t]he selection of authorized representatives who shall have power to take any action that is required by [the Act] to be taken by the mixed-blood members as a group." 25 U.S.C. § 677e. (Pet. App. D at 23). Appellant

AUC, an unincorporated association, was formed in 1956 and was the product of this organizational power. *Affiliated Ute*, 406 U.S. at 135.

The Constitution of AUC authorized its board of directors to "irrevocably delegate to corporations, . . . to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe . . . such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized." Constitution of the Affiliated Ute Citizens of the State of Utah, Article V, §§ 1(B), excerpts of which are reproduced as Appendix A to this Brief, at 4-5.

UDC was created by AUC and incorporated in 1958 with the stated purpose to "manage jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe . . . all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe . . . are now or may hereafter become entitled . . . and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation as herein provided." Articles of Incorporation of Ute Distribution Corporation, Article IV *Purpose*, excerpts of which are reproduced as Appendix B to this Brief, at 8-9.

The Articles of Incorporation of UDC further state that in exchange for said stock, the stockholders of UDC, the mixed-bloods, delegate to UDC and the officers

thereof authority to manage jointly with the Tribal Business Committee of the full-blood group all assets not susceptible to equitable and practicable distribution. Articles of Incorporation of Ute Distribution Corporation, Article VI, *Stock*. (App. B at 9-11).

Pursuant to the authority to delegate the power to manage assets of the mixed-blood members of the Ute Tribe, the Board of Directors of AUC, by resolution dated January 7, 1959, irrevocably delegated to UDC the authority to accomplish the purpose for which it was formed, that is, to manage jointly with the Tribal Business Committee all "assets not susceptible to equitable and practicable distribution." The AUC corporate resolution is reproduced as Appendix C to this Brief.

As part of the distribution plan each mixed-blood received ten shares of UDC stock, entitling the holder to vote for mixed-blood delegates, and to share in the distribution of proceeds from the jointly managed assets. However, stock of the corporation is "subject to transfer, devise or dissent. If a mixed-blood member . . . or any stockholder [] disposes of his stock, he will no longer have a vote or any control in the affairs of the corporation, or be entitled to share in the distribution of the proceeds. . . . " Articles of Incorporation of Ute Distribution Corporation, Article VI, *Stock*. (App. B at 10-11).

A number of mixed-bloods subsequently sold their stock in UDC. This gave rise to the *Reyos* litigation, which was subsequently consolidated with the *AUC* case in

Affiliated Ute, 406 U.S. 128 (1972).[1] *Reyos* was a suit by 85 mixed-bloods against a bank and two of its officers alleging violations of the Securities Exchange Act of 1934 and SEC Rule 10b-5 in connection with disadvantageous sales by the plaintiffs of their shares in UDC. The United States was added as a defendant, the plaintiffs alleging that it had breached its trust relationship with them by failing to oversee their improvident sales of the UDC stock and failing to prevent fraud in connection with those sales. The district court entered judgment in favor of plaintiffs.

The *Reyos* plaintiffs appealed the district court's decision on the grounds that the court had miscalculated damages on the stocks' market value at the time of sale, rather than on the value of the underlying mineral estate. *Id.* at 140-141. The Tenth Circuit Court of Appeals reversed, limited liability and remanded for a recalculation of damages. *Reyos v. United States*, 432 F.2d 1337 (10th Cir. 1970).

On appeal to this Court, plaintiffs and AUC claimed that, as the remedy in *Reyos* the beneficial interest in the underlying mineral estate should have been vested in the undivided mixed-blood plaintiffs, i.e., that they should have been entitled to receive future royalties and other benefits from the mineral estate based on a pro rata share. *Affiliated Ute*, Brief for Petitioners, portions of which are reproduced as Appendix D to this Brief, at 19-23.

---

[1] The *Affiliated Ute* case was the resolution of the appeals of two consolidated cases, referred to by this Court, respectively, as the *Reyos* case and the *AUC* case. *Affiliated Ute*, 406 U.S. at 132, 139-141.

After the district court's decision in *Reyos*, but before entry of the final judgment in that case, AUC filed the *AUC* case against the United States, claiming: (1) that its individual members (including the *Reyos* plaintiffs) were entitled to a pro rata distribution of the mineral estate underlying the reservation, on the theory that UDC had been invalidly created and that it should be abolished and its ownership of the mixed-bloods' mineral rights terminated; and (2) that AUC, and not UDC should be declared the authorized representative of the mixed-bloods for management of the mineral estate jointly with the tribal business committee. *Affiliated Ute*, 406 U.S. at 139-40; (App. D at 17-18).

The *AUC* case was filed by the AUC (the membership of which included the *Reyos* plaintiffs), to facilitate a flexible damage theory and to allow the judge to grant the full relief to which the *Reyos* plaintiffs thought they were entitled, i.e., relief not tied to the market value of the UDC stock. That relief was the abolition of the intermediary UDC, with the result that the AUC membership (all 490 mixed-blood Utes) would be entitled, not just to the damages from the sale of stock, but to direct pro rata ownership of the mineral estate and payment of all royalties and other proceeds of that estate from the inception of termination of their tribal status into the future.[2]

---

[2] AUC noted in the Brief of Petitioners that, as the authorized representative it, and not UDC,

> represents the persons entitled to the cash proceeds of the minerals. If UDC is the authorized representative, the non-Indian purchasers of the UDC stock [from the plaintiffs] are entitled to those payments. If AUC is the proper authorized representative, those who are entitled are its Indian members.

Affiliated Ute, Brief of Petitioners. (App. D at 20).

The United States filed a motion to dismiss the *AUC* case on the basis of subject matter jurisdiction and for failure to state a claim. The district court granted the motion on the grounds that the suit was an uncontested suit against the United States over which it did not have subject matter jurisdiction. The Tenth Circuit Court of Appeals affirmed. *Affiliated Ute Citizens v. United States*, 431 F.2d 1349 (1970).

On certiorari, this Court consolidated the *Reyos* and *AUC* appeals noting that the "two cases although different, have their roots in the formation of UDC." *Affiliated Ute*, 406 U.S. at 141. This Court recognized the interdependence of *AUC* and *Reyos*. This Court affirmed the Tenth Circuit Court of Appeals in the *AUC* case, and the judgment of the Court of Appeals in the *Reyos* case insofar as it concerned the United States; insofar as it concerned the bank and its officers, this Court affirmed in part and reversed in part, reinstating the district court's decision on the measure of damages.

Although this Court held that the lower courts had properly dismissed the *AUC* case for want of jurisdiction, this Court acknowledged AUC's prayer for "a determination that AUC and not UDC is entitled to manage that property jointly with the business committee of the full-bloods." *Affiliated Ute*, 406 U.S. at 139, 143. This Court reviewed the formation of AUC and UDC and concluded that "UDC's formation and structure were contemplated by the [Ute Partition] Act, and AUC itself created and breathed life and vigor into UDC." *Id.* at 144. This Court declared: "Clearly, it is UDC and not AUC that is entitled

to manage the oil, gas, and mineral rights with the committee of the full bloods." *Id.* This Court's decision concerning damages in the *Reyos* case was based expressly on the premise that UDC was the authorized representative of the mixed-bloods, and that the mixed-bloods' interest in the oil, gas and mineral rights on the reservation was represented by UDC stock.

The United States District Court for the District of Utah has repeatedly recognized UDC as the authorized representative of the mixed-blood Utes for purposes of managing with the tribal business committee those assets not susceptible to equitable and practicable distribution. *See Ute Distribution Corp. v. United States*, 721 F.Supp. 1202, 1204, n. 6 (D. Utah 1989), *rev'd on other grounds*, 938 F.2d 1157 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992); *Maldonado v. Hodel*, 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g*, 683 F.Supp. 1322, 1324 (D. Utah 1988); *Hackford v. First Security Bank*, 521 F.Supp. 541, 558 (D. Utah 1981); *Affiliated Ute Citizens v. Ute Indian Tribe*, No. 85-C-0569J (D. Utah February 3, 1987).

Petitioners filed the present action seeking, among other relief, a declaratory judgment that AUC rather than UDC is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the tribal business committee all indivisible tribal assets. The UDC and Secretary of the Interior filed motions to dismiss on the grounds that collateral estoppel prevents petitioners from relitigating the authorized representative issue. The district court granted the motions on those grounds.

The Tenth Circuit Court of Appeals affirmed on appeal and held that:

> The Supreme Court's decision in *Affiliated Ute Citizens v. United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity "entitled to manage the oil, gas, and mineral rights with the committee of the full bloods." 406 U.S. at 144, 92 S.Ct. at 1467. Thus, the doctrine of collateral estoppel precludes the appellants here from relitigating that issue.

(Pet. App. A at 16).

SUMMARY OF THE ARGUMENT

This Court's decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), that UDC and not AUC is the authorized representative of the mixed-blood Ute Indians for purposes of managing jointly, with the Ute Tribal Business Committee, all indivisible assets of the Ute Indian Tribe, collaterally estops petitioners from relitigating that issue. The Petition for a Writ of Certiorari should be denied.

ARGUMENT

The Tenth Circuit Court of Appeals held that as a matter of law, pursuant to the legal doctrine of collateral estoppel, AUC is precluded by the decision in *Affiliated Ute* from asserting that it is the authorized representative

of the mixed-blood Utes for purposes of managing those tribal assets not susceptible to equitable and practicable distribution. Petitioners argue, however, that the statements made by this Court in *Affiliated Ute* are "erroneous" dicta and therefore not binding, leaving the issue open for resolution on appeal.

Collateral estoppel, also known as issue preclusion, serves the purpose of conserving judicial resources, relieving parties of the costs and other burdens of repeated lawsuits, and, "by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Id.*

The Tenth Circuit Court of Appeals applied the doctrine of collateral estoppel in the case at issue and concluded that the four required elements had been met. First, the issue previously decided in *Affiliated Ute* is identical with the one presented in the action in question. Second, the *Affiliated Ute* action was finally adjudicated on the merits. Third, petitioners were parties, or in privity with parties to the prior adjudication. And finally, AUC had a full and fair opportunity to litigate the authorized representative issue. (Pet. App. A at 8-16).

A. The Issue Decided In *Affiliated Ute* Is Identical With The Issue Presented By Petitioners In The Present Action.

In *Affiliated Ute* this Court noted that, in its suit against the United States, AUC sought "a determination that AUC and not UDC is entitled to manage that property [i.e., the indivisible assets of the Ute Indian Tribe] jointly with the business committee of the full-bloods." *Affiliated Ute*, 406 U.S. at 139, 141. That is precisely the issue raised by AUC in the instant case. AUC has requested a declaratory judgment "that the Affiliated Ute Citizens and not the Ute Distribution Corporation (UDC), is the mixed blood Utes' statutorily authorized representative for the management of their interests in the undivided assets of the Ute Indian Tribe. . . . " Petitioners' Petition for a Writ of Certiorari at 3.

B. The Authorized Representative Issue Presented In *Affiliated Ute*, Was Finally Adjudicated On The Merits.

The "authorized representative" issue was directly addressed and decided by this Court in *Affiliated Ute*, which held that: "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 142.

This Court's decision in *Affiliated Ute* that UDC and not AUC is the authorized representative of the mixed-bloods was not just an aside by the court or a statement made for the purpose of "argument, illustration, analogy or suggestion," all factors which indicate dicta and not ruling. *See United States v. Crawley*, 837 F.2d 291, 292 (7th

Cir. 1988) (quoting *Stover v. Stover*, 483 A.2d 783, 786 (Md. App. 1984)). To the contrary, that decision was a necessary part of this Court's decision in the *Reyos* portion of its opinion.

This Court's decision in *Affiliated Ute* resolved an issue that was central to the concerns of AUC, the United States and the Court. That concern was demonstrated by the high level of attention which the parties and the Court paid to that issue as demonstrated by the intensive briefing by the parties and extensive analysis by the Court as to both the facts and law applicable to that question.

Affiliated Ute was the resolution of the appeals of two consolidated cases referred to as the *Reyos* case and the *AUC* case. The *AUC* case was filed by AUC as a strategic move by the *Reyos* plaintiffs and AUC to provide the court with a flexible theory of recovery. The emphasis on the interdependence of *AUC* and *Reyos* was apparent throughout AUC's briefing before this Court:

> [T]he remedy fashioned [by the trial judge in *Reyos*] was fair to the extent that it left the selling and non selling Indians with approximately the same amount of payments from the mineral royalties and Indian claims through the date of trial, but it was unfair to the extent that it failed to restore the selling shareholders to the beneficial title [to the mineral estate] – and that enormously valuable interest was left with the beneficiaries of the fraud.
>
> * * *
>
> In fairness, however, the error of the trial judge was in reality the error of counsel, for the

> *Reyos* case was tried on a pure damage theory which did not afford the flexibility necessary under the *Borak* doctrine. Thus *AUC* was filed, at a point well in advance of entry of final judgment in *Reyos*, to cover the hiatus between the trial judge's selected remedy and the full restitution which is necessary. Regrettably, the trial judge failed to see the alternative remedy which *AUC* supplied.
>
> If UDC was improperly formed, a speedy, complete, and relatively inexpensive remedy is at hand – merely recognize that fact and confirm the rights of AUC ["as authorized representative"] and its members [to their "beneficial interest in the minerals. . . . "]

(App. D at 24-25).

This Court recognized the interdependence of the *Reyos* and *AUC* cases and the central importance of resolving the authorized representative issue.

> On the petition of AUC and the 12 plaintiffs [in *Reyos*] this Court granted certiorari in both cases because of the importance of the issues for indians whose federal supervision is in the process of termination.
>
> * * *
>
> **The two cases, although different, have their roots in the formation of UDC, and it is not inappropriate that the cases were consolidated and are here together.**

Affiliated Ute, 406 U.S. at 141 (emphasis added).

Based at least in part on the foregoing, the Tenth Circuit Court of Appeals held that in *Affiliated Ute*, this

Court "did reach a final decision on the merits of whether the AUC was the mixed-blood Utes' authorized representative with respect to the indivisible tribal assets." (Pet. App. A at 9). The Tenth Circuit acknowledged that had this Court decided the *AUC* case alone, the Court's discussion of whether AUC was the authorized representative of the mixed-blood Utes would have been unnecessary (since the case was dismissed for lack of subject matter jurisdiction). But the Tenth Circuit recognized, "the Court did not decide *Affiliated Ute* [*AUC*] alone, however, but rather considered it along with *Reyos*." The Tenth Circuit Court of Appeals explained:

> In order to resolve the securities and damages claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for the Court to determine whether the UDC was the mixed-blood Utes' authorized representative. . . . The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

(Pet. App. A at 11-12).

The authorized representative issue presented in the instant case was a necessary part of this Court's decision in *Affiliated Ute*, and finally adjudicated on the merits.

C. Petitioners Were Parties, Or In Privity With Parties To *Affiliated Ute*.

AUC was an appellant in the *Affiliated Ute* case and sponsored the companion *Reyos* case.[3] The individual petitioners here, an AUC member and his son, are in privity with AUC and bound by the collateral estoppel effect of *Affiliated Ute*.

The Tenth Circuit Court of Appeals held that it is "beyond dispute the [petitioner] Glen Mac Murdock's claims derive from the AUC for purposes of determining whether the AUC is the mixed-blood Utes' authorized representative." (Pet. App. A at 13). Glen Mac Murdock is a member of AUC and would no doubt benefit if petitioners should obtain the requested relief. He must be bound by the collateral estoppel effect of *Affiliated Ute* to prevent an untenable result. "If a judgment regarding an association's status did not bind its members, then each member could relitigate the association's status until the association obtained a favorable result." (Pet. App. A at 14).

Petitioner Mac Eugene Murdock, the son of Glen Mac Murdock, is not a member of AUC. However, to the extent that he would benefit from the requested relief the same reasoning applies to him as applies to his father. To the extent that he would not benefit from the requested relief he has no standing. (Pet. App. A at 13 n.6).

---

[3] The same attorneys represented AUC and the *Reyos* plaintiffs (all members of AUC), and filed a single brief in the case before this Court.

D. AUC Had A Full And Fair Opportunity To Litigate The Authorized Representative Issue.

In its initial complaint in the *AUC* case, AUC claimed: (1) that its individual members (including the *Reyos* plaintiffs) were entitled to a pro rata distribution of the mineral estate underlying the reservation, on the theory that UDC had been invalidly created and that it should be abolished and its ownership of the mixed-bloods' mineral rights terminated; and (2) that AUC, and not UDC should be declared the authorized representative of the mixed-bloods for management of the mineral estate jointly with the tribal business committee. *Affiliated Ute*, 406 U.S. at 139-40.

As a result of the emphasis by the petitioners, in both the *Reyos* and the *AUC* cases, on their contention that UDC was not validly formed and that as a consequence AUC, and not UDC, must be declared the authorized representative of the mixed-bloods, the issue was intensively briefed before this Court. *See* citations to Brief of Petitioners (App. D), *supra*.

Because of this Court's view of the importance of the UDC issue to the Indians involved and the emphasis of petitioners on the interrelated nature of the *AUC* and *Reyos* cases with regard to the validity of UDC, both as a corporate entity and as authorized representative of the mixed-bloods under the Ute Partition Act, it is not surprising that this Court specifically addressed and resolved those matters in a detailed analysis in *Affiliated Ute*. *See Affiliated Ute*, 406 U.S. at 133-136, 143-44. This Court's extensive factual and legal analysis is a direct response to the efforts AUC made to emphasize the issue through its appeal and shows that its conclusion that

UDC is the authorized representative is well grounded in the facts of the case and an integral part of the *Affiliated Ute* opinion.

Courts have followed the directive of *Affiliated Ute* since it was handed down in 1972, and recognized UDC as the authorized representative of the mixed-blood Utes. To reexamine that decision in the face of the legal doctrine of collateral estoppel would be to unravel more than twenty years of history. AUC has had its day in court on the authorized representative issue.

CONCLUSION

Based on the foregoing, Respondent UDC respectfully urges this Court to deny the Petition for a Writ of Certiorari. The decision of the Tenth Circuit Court of Appeals is not in conflict with the decision of another United States court of appeals, is not in conflict with a state court of last resort, and does not so depart from the accepted course of judicial proceedings as to merit this Court's power of supervision. Sup. Ct. R. 10.1(a). Review, by this Court, is unwarranted.

Respectfully submitted,

MAX D. WHEELER
CAMILLE NEDDO JOHNSON
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Eleventh Floor
Post Office Box 45000
Salt Lake City, Utah 84145
(801) 521-9000

Attorneys for Respondent
Ute Distribution Corporation

APPENDIX A

CONSTITUTION OF THE AFFILIATED UTE CITIZENS OF THE STATE OF UTAH

PREAMBLE

We, the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah invoking the divine guidance of Almighty God, seeking to more effectively comply with the legal requirements of the United States Government and all political subdivisions to which we are, and are to become, subject, to more ably assume the new obligations in justice now to be required of us, to protect the privileges and rights we do equitably claim, to preserve the cultural values we may possess, to encourage desirable and amicable relations with other citizens of our respective communities and to promote the general welfare of all, do ordain and establish this Constitution for the Affiliated Ute Citizens of the State of Utah.

ARTICLE I.

MEMBERSHIP

The membership of the Affiliated Ute Citizens of the State of Utah shall consist of all persons whose names appear on the final mixed-blood membership roll as published in the Federal Register pursuant to Public Law 671 – 83d Congress 2nd Session (68 Stat. 868)

ARTICLE II.

Board of Directors

Section 1. The management of the affairs and the funds of the Affiliated Ute Citizens of the State of Utah shall be vested in a Board of five Directors.

Section 2. The members of the Board of Directors shall be elected for a term of two years except at the first election when three members shall be elected for a term of one year and two members for a term of two years. The members of the Board of Directors shall be elected in a manner as provided in this Constitution and the By-Laws.

Section 3. The Board of Directors shall elect by ballot one of their number president and one vice-president. The office of Secretary and treasurer may, in the discretion of said Board, be combined and said secretary and treasurer may, but need not necessarily, be members of the Board of Directors or members of this organization.

Section 4. Three directors present in person at any meeting of the Board shall constitute a Quorum. Business may be transacted by a majority vote of the Directors present at such meeting. In the case of a tie vote upon any matter, the same shall fail to pass for want of a majority vote. The presiding officer shall be entitled to vote.

Section 5. Any action of a majority of the Board of Directors, although not at a regularly called meeting, and the record thereto, if assented to in writing by all of the other members of the Board, shall always be as valid and effective in all respects as if passed by the Board at a regular meeting.

ARTICLE III.

Nominations and Elections

Section 1. Any member of the Affiliated Ute Citizens of the State of Utah twenty-one years of age or over shall be entitled to vote and hold office.

Section 2. All elections shall be by secret ballot and all nominations and elections shall be held in accordance with the By-Laws.

Section 3. The first general election shall be called by the Superintendent of the Uintah and Ouray Agency on the third Saturday following ratification of the Constitution and By-Laws and the posting of the results of the election therefor at the Uintah and Ouray Agency. Thereafter, elections shall be held in accordance with rules adopted by the board of Directors as provided in Article IV of the By-Laws.

ARTICLE IV.

Vacancies and Removal from Office

Section 1. If a member of the Board of Directors shall die, resign, be removed or recalled from office, as hereinafter provided, or be found guilty in any state or federal court of a felony or misdemeanor involving dishonesty the position shall be declared vacant and the Board of Directors shall fill the vacancy until the next general election.

Section 2. The Board may, by four affirmative votes, expel any member of said Board for neglect of duty or gross misconduct. Before any vote for expulsion is taken on the matter, the member shall be given a written statement of the charges against him at least five days before the meeting of the Board, before which he is to appear and an opportunity to answer any and all charges at such designated Board meeting. The decision of the Board shall be final.

Section 3. Upon receipt of a petition signed by one-third of the eligible voters of the organization calling for the recall of any member of the Board, it shall be the duty of the board to call an election on such recall petition. No member may be recalled in any such election unless at least fifty per cent (50%) of the legal voters of the organization shall vote at such election and such election shall carry by at least a two-thirds majority of those voting.

ARTICLE V.

Powers of the Board of Directors

Section 1. The Board of Directors shall exercise the following powers, subject to any limitations imposed by the statutes or the Constitution of the United States or the State of Utah, and subject further to all express restrictions upon such powers contained in this Constitution and By-Laws adopted pursuant thereto, and subject to review by the membership of said organization at any annual or special membership meeting.

(a) To perform all the duties and functions of the mixed-blood members as the authorized representatives thereof pursuant to and in accordance with Public Law 671- 83d Congress, 2nd Session (68 Stat. 868), and all amendments thereto.

(b) To irrevocably delegate to corporations, or the officers thereof, organized pursuant to and in accordance with Public Law 671 – 83d Congress, 2nd Session (68 Stat. 868), to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, such

powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized.

(c) To employ legal counsel, the choice and fixing of fees to be subject to the approval of the Secretary of the Interior until federal supervision over all of the members of said group and their property is terminated in the manner provided in said act.

(d) To appropriate for salaries of employees or for other purposes of the organization, any available, unobligated funds, provided, that all appropriations are within a budget previously adopted by the general membership; provided further, that all appropriations made prior to the termination of federal supervision over the members of said organization and their property shall be subject to such approval by the Secretary of the Interior as may be required by law. Any appropriation not included within a previously adopted budget must be first approved at a meeting of the membership.

(e) To take such action as may be deemed advisable to foster and encourage participation of the members of the organization in the civic affairs of the cities, towns, counties, state and the United States.

(f) To negotiate with all governmental bodies, agencies, civic and religious groups as representatives of the members hereof for the purpose of promoting the general welfare of said members.

(g) To provide for a referendum of the members of this organization whenever required under said Public Law 671 or upon any other matter deemed by the board to be necessary or desirable to the welfare or best interests of the members of this organization.

(h) To employ an executive director, if such is deemed advisable by said Board, provided, no member of the Board of Directors may be selected as such executive director.

* * *

APPENDIX B

ARTICLES OF INCORPORATION OF UTE DISTRIBUTION CORPORATION

KNOW ALL MEN BY THESE PRESENTS: That we, the undersigned mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, as determined by Public Law 671 – 83rd Congress, approved August 27, 1954, 68 Stat. 868, acting pursuant to the provisions of said Public Law 671, as amended, and in accordance with the Plan for Distribution of the Assets of the Individual Mixed-Blood members of said Tribe, as adopted by said mixed-blood members and approved by the Secretary of the Interior, and pursuant to a resolution adopted by said mixed-blood members, and being desirous of organizing a corporation under the laws of the State of Utah on behalf of said mixed-blood members for the purpose of managing jointly with the Tribal Business Committee of the full-blood group of said Indian Tribe, as provided in said Public Law 671, all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practical distribution between said mixed-blood and full-blood groups and the members thereof, and for the purpose of distributing the net proceeds therefrom, do agree and hereby certify as follows:

ARTICLE I

Name of Corporation

The name of the corporation is Ute Distribution Corporation.

ARTICLE II

Incorporators

The names of the incorporators and their places of residence are:

Name	Residence
Albert H. Harris	Roosevelt, Utah
David H. Workman	2232 Taylor Avenue, Ogden, Utah
Lula H. Murdock	Fort Duchesne, Utah
Benny Murdock	Fort Duchesne, Utah
Preston V. Allen	Altonah, Utah

ARTICLE III

Period of Incorporation

This corporation shall exist perpetually unless sooner dissolved or disincorporated according to law.

ARTICLE IV

Purpose

The pursuit of business which it is agreed shall be carried on by this corporation shall be to manage jointly with the Tribal Business Committee of the full-blooded members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, pursuant to said Public Law 671, as amended, the aforesaid Plan for Distribution, all unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution to which the mixed-blood members of the said tribe, as defined and determined by said Public Law

671, are now, or may hereafter become entitled pursuant to said Public Law 671 or the laws of the United States and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation as herein provided.

The powers of this corporation shall be limited to the joint management of such claims and assets and to the receipt and distribution of the income or proceeds therefrom together with such other powers as may necessarily be incident thereto. For the purpose of carrying any of its pursuits, business and powers, this corporation may contract with other individuals, organizations, corporations or entities.

ARTICLE V

Place of Business

The principal place of business shall be at Fort Duchesne, Utah.

ARTICLE VI

Stock

The stock of this corporation shall consist of 4,900 shares of common stock without nominal or par value. The subscribers of the stock of this corporation consist of the 490 mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, whose names appear upon the final rolls of the mixed-blood group of said tribe as determined in accordance with and pursuant to the provision of said Public Law 671, and each of said

490 members are subscribers to and each shall receive ten shares of stock.

The stockholders, in exchange for said stock, delegate to the corporation and the officers thereof, without further act or deed, authority to manage jointly with the Tribal Business Committee of the full-blood group of said Ute Indian Tribe all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution under said Public Law 671, in which said mixed-blood members have any interest, and to receive the proceeds therefrom and to distribute the same, less any necessary or incidental expense, to the stockholders hereof.

Ownership of stock in this corporation shall entitle the owner thereof to share proportionately with other stockholders in the distribution of the proceeds received by the corporation from said claims, rights and aspects, except that fifty per centum of all distributions to any individual mixed-blood member made pursuant to any division or distribution hereunder shall have deducted therefrom any sum or sums of money owed by such mixed-blood member to the tribe, whether due or to become due, unless in the opinion of the Secretary of the Interior said debts are not adequately secured in which event the entire amount to be distributed shall be subject to such offset, and any transferee of such stock shall take the same subject to such provision.

The stock of the corporation is subject to transfer, device or descent. If a mixed-blood member of said tribe, or any stockholder herein disposes of his stock, he will

not longer have a vote or any control in the affairs of the corporation, or be entitled to share in the distribution of the proceeds as hereinbefore provided, unless and until he thereafter again becomes a stockholder in the corporation. Transferees, legatees and heirs of any stock in the corporation shall acquire all rights to which a stockholder is entitled, including voting rights and the right to share in the distribution of the income or proceeds available for such distribution.

* * *

APPENDIX C

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, that the Board of Directors of the Affiliated Ute Citizens of Utah delegate the authority to all three corporations – Antelope Sheep Range Company, Rock Creek Cattle Company and the Ute Distribution Corporation, to organize in accordance with the constitution of the Affiliated Ute Citizens of the State of Utah, Article V, Section 1, Paragraph (b) as follows:

> "To irrevocably delegate to corporations, or the officers thereof, organized, pursuant to and in accordance with Public Law 671 – 83d Congress, 2nd Session (68 Stat. 868), to receive, manage, distribute or otherwise handle assets of the mixed-blood members of the Ute Indian Tribe of the Uintah and Ouray Reservation, such powers and authority as may be necessary or desirable in the accomplishment of the objects and purposes for which said corporations may be so organized."

/s/ Elmer Hackford
Elmer Hackford,
President

/s/ Preston V. Allen
Preston V. Allen,
Vice President

/s/ Joseph A. Workman
Joseph A. Workman,
Member

/s/ Lula H. Murdock
Lula H. Murdock,
Member

/s/ Elizabeth Bumgarner
Elizabeth Bumgarner,
Member

CERTIFICATION

I hereby certify that the above resolution was adopted by the Board of Directors of the Affiliated Ute Citizens of the State of Utah, at a Special meeting held at Fort Duchesne, Utah, on the 7th day of January, 1959 at which a quorum was present and by a vote of 5 for and 0 against.

/s/ Crystal Welcken
Secretary, Board of Directors

RESOLUTION NO. 59-8

Affidavit No. 3, Item 12

APPENDIX D

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1331

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

-v.-

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The order of the United States District Court for the District of Utah entering judgment for plaintiffs in *Reyos v. First Security Bank* (Reyos herein), and dismissing *Affiliated Ute Citizens of the State of Utah v. United States* (AUC herein) on the merits and for lack of jurisdiction, are unreported (A.[1] 573 and 564, respectively). The opinions of the Court of Appeals for the Tenth Circuit reversing

---

[1] "App." refers to the Appendix of pertinent Statutes and Regulations appearing at the back of this brief. "A" refers to the separately bound Appendix of proceedings herein. "E" refers to the Exhibit volume of the Appendix. "R" refers to the Record.

the *Reyos* judgment and affirming the dismissal of *AUC* are reported at 431 F.2d 1337 and 1349, respectively (A. 576 and 587).

JURISDICTION

The decisions of the Court of Appeals were simultaneously filed in June 19, 1970. Motions for rehearing in each case were simultaneously denied on November 14, 1970 (A. 588). A petition for rehearing in banc was filed in *Reyos* but was not considered (A. 3). The Petition for Certiorari was filed on February 9, 1971 and granted on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (l).

STATUTES AND REGULATIONS INVOLVED

The Ute Termination Act (Termination Act) is published at 25 U.S.C. §§ 677-677aa, and is reproduced in its entirety at App. i-xviii. The pertinent regulations under the Termination Act, formerly published at 25 C.F.R. part 243 are reproduced at App. xviii-xx. The relevant securities provisions are section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Rule 10b-5 adopted thereunder (17 C.F.R. 240.10b-5) (Rule 10b-5 or Rule) reading as follows:

15 U.S.C. § 78j:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5:

It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

QUESTIONS PRESENTED

1. Whether bankers who contract to enforce the Indian laws and regulations applying to an Indian corporation, by acting as its transfer agent, depository for the individual Indian's stock, and agent for the conduct of the business of the corporation, violate Rule 10b-5:

(a) When they secretly act simultaneously as market makers for the stock, or as agents for or in aid of non-Indian purchasers?

(b) When they cause stock transfers to be made in a manner other than as specified in the Indian laws and regulations?

(c) When they withhold information designed to discourage the Indian from selling his stock?

(d) When they alter or misrepresent documents filed with government officials primarily responsible for supervising the sale of Indian property?

2. Does the reference to conduct "in connection with the purchase or sale of any security" in Rule 10b-5 mean that the defendant must be acting in his own interest, as a purchaser or seller, for a profit?

3. Under an Indian termination act, declaring a phased withdrawal of Government services rendered to Indians and an end to supervision of their restricted property:

(a) Are the Indians deprived, by implication, of any interest in their property, or do they lose their cultural identity as American Indians so that benefits of law other than under Federal statutes are eliminated by implication?

(b) Is BIA's administrative modification or acquiescence in the modification of termination procedures prescribed by Congress, so that protections to Indians and their property are eliminated or reduced, actionable negligence?

(c) Does publication of a "termination proclamation" eliminate the Government's duty to Indians

with respect to limited supervisory functions Congress directed be performed after publication, or as to property over which the Government retains limited supervisory control?

4. The subsidiary question in *AUC* of whether the United States District Court has jurisdiction to determine an Indian's rights in property, including management rights, purportedly granted under a termination act?

5. The subsidiary question in *Reyos* of what relief is appropriate to the individual Indian?

STATEMENT OF THE CASE

A. *Summary of the Proceedings Below.*

AUC is an unincorporated association of all terminated Ute Indians formed by the Secretary of Interior (Secretary).

AUC's complaint sought confirmation of rights under the Termination Act (1) in its own behalf, to exercise management privileges for its members with respect to their unadjudicated legal claims and the mineral estate in the Uintah and Ouray Reservation (Reservation) and (2) on behalf of its 490 Indian members, declaring them to be vested with beneficial rights in the Reservation minerals. The *Reyos* plaintiffs are members of AUC who seek damages for their loss of mineral royalties and Indian claims payments from and after 1963-64, which occurred when the Bureau of Indian Affairs (BIA) caused the terminated Utes' share of the cash proceeds to be paid to a corporation in which they formerly held stock. The Indians had sold, or were induced to sell, their stock in transactions which the trial judge determined to be fraudulent, and the Indians' shares in the cash proceeds were paid to the non-Indian purchasers.

The Complaint in *AUC* was dismissed for alleged failure to state a cause of action and lack of jurisdiction. The trial judge awarded damages to the *Reyos* plaintiffs against First Security Bank of Utah, N.A., (Bank) and its officers, Gale and Haslem, under Rule 10b-5, and against the United States for negligent administration of the Termination Act. The Court of Appeals for the Tenth Circuit affirmed the dismissal of *AUC*, and reversed the judgment in *Reyos*, ruling that the United States owed no duty to the terminated Utes and that the Bank and its officers had not violated Rule 10b-5.

B. *Summary of the Termination Act.*

The Termination Act provided that as to 27.16186% of the membership of the Ute Indian Tribe (Tribe) federal supervision and services to the Indians would be ended[2] and restrictions on their property would be removed.[3] The mineral estate in the Reservation, which was both difficult to divide and an intangible asset the terminated Utes could be expected to have trouble dealing with, was excepted from the removal of "restrictions" and was to be held by the United States, with the beneficial interest retained in common among the terminated and non-terminated Utes.[4] The "termination proclamation" ending supervision of the individual Indian was published on August 26, 1961, but Congress directed that real property

---

[2] Section 23, 25 U.S.C. § 677v (1964), App. xvi.

[3] Section 16, 25 U.S.C. § 677o (1964), App. xiii.

[4] *Id. See also* section 10, 25 U.S.C. § 677i (1964), App. vi at viii.

be subject to limited supervision by the Secretary, pursuant to a right of refusal in the "members of the tribe" until August 27, 1964.[5]

The mineral estate was and is subject to joint management by the "authorized representative" of the terminated Utes and the Tribe as the representative of the non terminated Utes.[6] Title to the mineral estate remains in trust with the United States for the Indians beneficially entitled to it.

C. *The "Authorized Representative" Problem.*

AUC claims that it is the "authorized representative" specified in the Termination Act, and that Ute Distribution Corporation (UDC) was improperly substituted in its stead. The authorized representative is empowered to act with the Tribe in the approval of mineral leases, but more importantly, represents the persons entitled to the cash proceeds from the minerals. If UDC is the authorized representative, the non-Indian purchasers of the UDC stock are entitled to those payments. If AUC is the proper authorized representative, those who are entitled are its Indian members.

The Termination Act provided that the authorized representative was to be selected by "an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary."[7]

---

[5] Section 15, 25 U.S.C. § 677n (1964), App. xii.

[6] Section 10, 25 U.S.C. § 677i (1964), App. vi at vii.

[7] Section 6, 25 U.S.C. § 677e (1964), App. iii.

* * *

APPROPRIATE RELIEF SHOULD BE DEVISED

The trial judge recognized that UDC was unique, for it owned no assets, engaged in no business other than as authorized representative, and was a mere "conduit" through which the terminated Utes share of the proceeds from the minerals and judgment claims were paid.[162] The Indians who sold, on the other hand, were unaware of the potential value of the stock[163] and did not even have the benefit of the red letter warnings which might have alerted them to its potential value. Non-Indian buyers and sellers, many of whom were no better informed than the Indians themselves, were in turn "materially and substantially affected [in] the offer and sell prices" by the fraudulent market making activities of Gale and Haslem.[164]

The Indians, in their uniformed condition and subject to the other disadvantages determined by the trial judge, were induced to sell stock representing assets valued by plaintiffs experts at in excess of $28,000 per share.[165] At

---

[162] A. 528.

[163] A. 527.

[164] A. 522.

[165] The Reservation sits on top of one of the richest known mineral structures in the world. A. 352, 356. The mineral of primary value is oil shale, containing 110,440,000 barrels of recoverable oil, A. 357-66, 404, but it also contains oil and gas A. 353, 382 and coal A. 354, 384 in known quantities, plus an assortment of other minerals the amount of which is unknown. A. 352, 378, 384. Plaintiffs witnesses Christiansen and Hamilton both testified concerning the market value of these resources, based upon actual sales transactions in 1963-64. A. 368-70, 406. Based upon Dr.

the same time, the trial judge considered that damages computed on the basis of asset value "would be incongruous with the situation of numerous mixed bloods who have retained their stock," because the possibly imprudent Indians who sold would realize values immediately which their more prudent brothers who did not sell must wait a long period of time to obtain, and elected instead to fashion a remedy taking varying account of all of these factors.[166] An assumed fair value – fair, it must be observed, with reference to those who did not sell rather than those who did – of $1500 per share was adopted.

Christiansen's estimates, which were the more conservative of the two, the actual value of the mineral assets is as follows:

Mineral	Value of total deposits underlying the Reservation	Terminated Ute's share (Col. 2 multiplied by 27.16186%)	Value per share (Col. 3 divided by 4,900)
Oil & Gas	$ 50,136,000.00	$ 13,621,249.30	$ 2,779.88
Coal	57,287,991.00	15,564,344.85	3,176.40
Oil Shale	414,150,000.00	112,518,756.90	22,963.01
Dawsonite	Present but not established	Great Potential	0
Nahcolite (trona)	Present but not established	Great Potential	0
Gilsnoite	Present but not established	Great Potential	0
TOTAL	$521,573,991.00	$141,704,351.05	$28,919.29

[166] A. 530. See also the trial judge's comments at A. 572.

The trial judge's approach was basically sound,[167] at least as far as it went:

> "We, therefore, believe that under the circumstances here *it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose.* (Emphasis added.)
>
> * * *
>
> "It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded. 'And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[168] (citations omitted)

The trial judge failed to give effect to the corollary principles, that in fashioning a remedy (1) the plaintiff should be fully compensated and (2) the wrongdoer should not

---

[167] *See*, generally, Story Parchment Co. v. Paterson Co. 282 U.S. 555, 562-63 (1931); Espaillat v. Berlitz Schools of Languages of America, 383 F. 2d 220, 222 (D.C. Cir. 1967); McCormack On Damages § 122 (1935). As to the propriety of considering underlying mineral values, *see* Montana Railway Co. v. Warren, 137 U.S. 348, 352 (1890); United States v. Sowards, 339 F.2d 401 (10th Cir. 1964); United States v. Silver Queen Mining Co., 285 F.2d 506 (10th Cir. 1960). Cf. Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 Harv. L. Rev. 233, 262 (1930)

[168] J. I. Case C. v. Borak, 377 U.S. 426, 433 (1964), *Accord*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386 (1970).

be rewarded with a windfall.[169] In other words, the remedy fashioned was fair to the extent that it left the selling and non selling Indians with approximately the same amount of payments from mineral royalties and Indian claims through the date of trial, but it was unfair to the extent that it failed to restore the selling shareholders to the beneficial title – that enormously valuable interest was left with the beneficiaries of the fraud.

The Court of Appeals compounded the error of the trial judge by holding that market value, *and no other factor,* could be considered in computing damages, and that "the measure of damages . . . *is the profit made by the defendants on resale of stock purchased from the plaintiff.*"[170] (Emphasis added) The latter holding is untenable as a rule of damages, runs counter to the fundamental purpose of the securities laws to protect investors, and is an open invitation to fraud committed through an agent.

In fairness, however, the error of the trial judge was in reality the error of counsel, for the *Reyos* case was tried on a pure damage theory which did not afford the flexibility necessary under the *Borak* doctrine. Thus *AUC* was filed, at a point well in advance of entry of final judgment in *Reyos* to cover the hiatus between the trial judge's selected remedy and the full restitution which is

---

[169] See Mitchell v. Texas Gulf Sulphur Co., ___ F.2d ___ (10th Cir., April 26, 1971).

[170] A. 587.

necessary? Regrettably, the trial judge failed to see the alternative remedy which *AUC* supplied.[171]

If UDC was improperly formed, a speedy, complete, and relatively inexpensive remedy is at hand – merely recognize that fact and confirm the rights of AUC and its members. The United States will suffer no loss, for it makes no claim to title to the minerals and agrees that they are held in trust for those beneficially entitled to them. The *Reyos* plaintiffs, in that event, have been damaged in an amount equal to the lost royalties and other payments, distributed in the form of dividends on the stock during years between 1963-64 to present. That sum is approximately the amount awarded by the trial judge.[172] The purchasers of UDC stock, for the same reason, will not be injured for they have already recovered their investment, but as purchasers in transactions violating the Indian laws they have dealt at their peril, in any event.[173]

---

[171] The pertinent dialogue between court and counsel is at A. 559-60.

[172] The value of the damage elements in findings 3, 4, & 5, A.528-29 equal $853.97 per share, and finding 4 (d), A. 503 equals $357.00 per share. In addition, mineral royalties, which averaged $71 per share per year at the time of trial A. 258, 326-28 for eight years equals $568 per share. These figures are not, of course, precise as to years subsequent to trial, and additional evidence should be taken, but the sum of all three items is $1,778.97 per share, which makes the trial judges assume value of $1500 per share look very conservative.

[173] *See* footnote 119, *supra*, and related text.

The alternative is to award the Indians judgment based upon the value of the underlying assets, which by uncontroverted evidence amounts to in excess of $28,000 per share based upon market values in 1963-64.

In either event, under the recent holding of this Court in *Mills v. Electric Auto-Lite Co.*,[174] plaintiffs should also be awarded their costs in maintaining this action, including reasonable counsel fees. Recovery of such expenses is necessary to fully restore the terminated Utes to the position of the non-selling Indians. Counsel fees, moreover, should comprehend the recovery of the mineral estate, for if they do not, other lawyers will surely not be so foolhardy as to undertake the enormous expenditure of effort necessary to right social injustices such as are involved in this case.

CONCLUSION

The facts of this case present, once more, the recurring problem of the clash between the Indian culture, with its orientation to human values and the common enjoyment of natures bounty, with non-Indian American society, with its fixation on personal property rights and the profit motive. The plight of the terminated Ute is the plight of the entire Indian community in microcosm, and is not so much a criticism of either culture as it is a study in why a whole culture cannot be changed with the stroke of a legislator's pen and why rules against overreaching,

---

[174] 396 U.S. 375 (1970). *See also*, Sprague v. Ticonic National Bank, 307 U.S. 161, 166 (1939).

whether they be a part of the Indian laws or the securities laws, should not be relaxed.

As in the past, it is the solemn duty of the courts to fairly adjust rights in the event of such a clash. In this case, such an adjustment should include (1) confirmation of AUC's rights as authorized representative, (2) confirmation of AUC's members beneficial interest in the minerals and (3) damages equivalent to the cash proceeds the Indian has been deprived of.

Respectfully submitted,

PARKER M. NIELSON
320 Kearns Building
Salt Lake City, Utah
Attorney for petitioners